Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SALINAS VALLEY NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 88-RC-l-SAL 15 ALRB No. 4

DECISION AND ORDER ON CHALLENGED BALLOTS

Following the filing of a Petition for Certification by the United Farm Workers of America, AFL-CIO (UFW or Union) on January 4, 1988, the Salinas Regional Director conducted a secret ballot election among the agricultural employees of Salinas Valley Nursery (Employer) on January 11, 1988. The Official Tally of Ballots revealed the following results:

UFW 7

No Union 2

Challenged Ballots 14

Total 23

As the challenged ballots were sufficient in number to affect the outcome of the election, the Regional Director conducted an investigation and determined that the issues concerning 13 of those ballots were such that they should be the subject of a full evidentiary hearing pursuant to the authority of Title 8, California Code of Regulations, Section 20363(a) and

20370.[1/] On September 23, 1988, following a hearing in which all parties participated[2/], Investigative Hearing Examiner (IHE) Marvin J. Brenner issued the attached Decision in which he recommended that the challenges to two of the ballots be sustained and that the challenges to the remaining 11 ballots be overruled.

Thereafter, the Employer timely filed exceptions to the IHE's recommendation that the challenges to the ballots of Jimmy Uyeda and Jesus Molina Guevara (Molina) be sustained. The employer contends that the IHE erred in finding Uyeda and Molina to be a managerial employee and a supervisor, respectively, and, thus, not subject to inclusion in the bargaining unit.

The employer also excepted to the IHE's further finding that since four children who cast ballots were employed in agriculture during the pertinent pre-petition eligibility period, they meet the statutory requirement for eligibility to vote in representation elections conducted under the provisions of the Agricultural Labor Relations Act (ALRA or Act) and, therefore, their ballots should be opened and counted.

For the reasons set forth below, the Board finds merit in

[1/]The 14th ballot was cast by Enrique Garcia Huerta (Garcia), whom the Regional Director found had departed on a leave of absence prior to the filing of the Petition for Certification, had extended his leave beyond the period authorized and had been terminated for that reason. The Regional Director also found that the Employer and the Union agreed that Garcia had not been employed during the pre-petition eligibility period and that the challenge to his ballot should be sustained.

[2/]The Regional Director of the Salinas Regional Office of the Agricultural Labor Relations Board was permitted to intervene in the case for the limited purpose *of* assisting the Board in developing a full record in this proceeding.

the Employer's exceptions to the IHE's recommendation that the challenges to the ballots of Uyeda and Molina be sustained. After the foregoing ballots are opened and counted by the Regional Director, and the results incorporated in a revised Tally of Ballots, the Board will consider the question concerning the ballots of the four children, but only if they then prove to be outcome determinative.[3/]

In the absence of any exceptions thereto, the Board adopts, pro forma, the IHE's recommendation that the challenges to the seven ballots cast by the following individuals be overruled: Mayumi Nishimoto, Fusae (Linda) Holbrook, Mike Moto, Masahiro Yoneda, Aldo Saldana, Steve Pacheco and Tom Pacheco. Background

George Onitsuka and his wife, Akiko, are producers of fresh cut flowers for the wholesale florist trade. They have operated a nursery for almost 17 years on approximately six acres of land situated in the Salinas area. The facilities include six free-standing greenhouses and a packing shed which houses both a cooler for the storage of fresh flowers and office space. At the

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[3/]Member Gonot would note the mandate of ALRA section 1157, which provides in pertinent part that, "All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote." (Emphasis added.) There are no express limitations in the ALRA which restrict voting eligibility on the basis of age. In addition, the Board has taken cognizance of situations in which it is appropriate to allow an employee who performs agricultural work for an employer during the pertinent payroll period to vote in a unit election when his or her name does not actually appear on a payroll roster. These legal and factual circumstances may be dispositive with respect to the minors whose ballots were challenged .

time of the election, there were approximately 10 full-time employees and a few part-time employees, not including the Onitsuka's children who also work in the nursery when not attending school.

The record reveals that the senior Onitsukas are involved at all times in all facets of the operation. Whereas full time employees work eight hour days, six days a week, George and Akiko normally put in 10 hours or more a day, seven days a week, often spending nights in a trailer on the nursery grounds. At least one of them is nearly always on the premises, with George's absences limited to a one to three hour period while he attends to personal or business matters in town. He testified that his longest absence from the nursery occurred when he and his wife traveled to Jaoan for two weeks in 1983. Primary responsibility for running the nursery during that time was left to a non-employee, Eizo Nishida, whom George described as "almost like a brother to me." Jimmy Uyeda testified that during the approximately four years he has worked for the employer, the Onitsukas were both absent at the same time on only one or two days .

Onitsuka testified that he supervises all employees and, further, that he finds no need to delegate supervision, even during short absences, because each employee understands his or her work assignment and is able to work independently. Should any problems or questions arise during his absence, he feels the matter can be held in abeyance pending his return. He also testified that he has never delegated authority to hire, fire or

discipline employees or even, for example, to grant permission to an employee to take time off in order to meet a medical appointment.

Supervisor

Individuals deemed to be supervisors within the meaning of the Act are not agricultural employees and thus are generally not entitled to the protection of the Act. In its brief in support of exceptions to the IHE's Decision, the Employer urges the Board to find that Molina is not a supervisor. The starting point for our inquiry is Labor Code section 1140.4(j)[4/] which defines supervisor as:

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Construing virtually identical language in the National Labor Relations Act (NLRA) in Vulcanized Rubber and Plastics Company, Inc. (1961) 129 NLRB 1256, 1260-1261 [47 NLRB 1175], the National Labor Relations Board (NLRB) concluded that certain individuals were not supervisors because although they:

> direct the work of other employees, they also perform the same type of work themselves. . . In addition, they do not have the authority to make effective recommendations as to hire, tenure, discipline, or any changes in the status of the other employees. As to the issue of whether they responsibly direct the employees in their sections, the record fails to establish that their direction is anything other than the routine type of direction normally exercised by older, more experienced employees with respect to less experienced coworkers.

Molina has been employed by the Employer since 1977. He alone handles all irrigation. In addition, he performs odd jobs as necessary, primarily maintenance and repair, and oversees fertilizing. With respect to the later, Onitsuka testified that he trained Molina and that Molina carries out the tasks for which he has been trained. Accordingly, Molina follows a set schedule, applying certain fertilizers according to a pre-determined formula. Fertilizer normally is applied twice a month unless the weather is particularly warm, in which event application is made weekly. Fertilizing takes approximately one hour.

Each greenhouse is watered once a week automatically, on a rotation basis, unless weather dictates a daily watering schedule. Molina usually devotes three to four hours a day to watering alone except when the weather is particularly warm, in which event he may devote the greater portion of each day to that task. Onitsuka testified that, in addition to weather or when a particular greenhouse was last watered, it is mandatory that irrigation occur immediately following the application of fertilizers. Molina advises employees when and what to fertilize, sometimes assisting them, and thereafter handles the watering alone. Molina indicated that employees know how to fertilize and it is only the new employees who require some direction in that regard.

When questioned specifically about Molina's role in the fertilizing operation, Onitsuka replied that Molina only works

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[4/] All section references are to the California Labor Code unless otherwise specified.

with other employees, as a group or team leader, because he has had experience with fertilizing but primarily because it is essential that fertilizing and watering be coordinated. Onitsuka added, without contradiction, that Molina has never hired or fired an employee although, on two occasions, he introduced to his Employer two friends whom he recommended for future employment. Onituska agreed to interview them and testified that his "impression of these people was good, so on a trial basis of 3 months, I agreed to hire them temporarily." He explained further that he is inclined to consider persons recommended to him by his employees because he trusts them and said he has hired several persons on the basis of recommendations by persons already in his employ.

On the facts set forth above, we find that the criteria for supervisor as set forth in the Act have not been met. Molina carries out duties for which he has been trained by Onitsuka, performing those duties in accordance with a set schedule established by his Employer and subject to the direct supervision of his Employer. While Molina may infrequently direct the work of other employees, specifically as it relates to fertilizing, that duty accounts for only a small percentage of the normal work week of those employees. As Molina was the most experienced employee with regard to that task, he directed less experienced employees, but his communication with them was of only a routine nature. Although there is evidence that Molina recommended two friends for possible employment, and they were in fact subsequently employed, there is also evidence that other employees who were not alleged

to be supervisors similarly recommended acquaintances who also were hired.

While Onitsuka made Molina what he [Onitsuka] described as a "mayordomo" from July to September or October, 1987, he also testified that he used the term to mean no more than a crew or team leader and that he did not intend to thereby clothe Molina with supervisorial authority. When determining whether an individual is *a* "supervisor" within the meaning of the Act, the Board looks to actual duties rather than merely to job titles. (National Labor Relations Board v. Chicago Metallic Corp. (9th Cir. 1986) 794 F.2d 527 [122 LRRM 3163].)

We cannot find that Molina had authority, or exercised authority, which, under section 1140.4(j) would render him a supervisor within the meaning of the Act and, therefore, the challenge to his ballot should be, and it hereby is, overruled.[5/] Managerial Employee

The Employer contends that Jimmy Uyeda is not a

[5/]Unlike the IHE, the Board is not persuaded that Molina's alleged supervisorial status is to be governed by Foster Poultry Farms (1980) 6 ALRB No. 15 and Perry's Plants (1979) 5 ALRB No. 17, as the individuals found to be supervisors in those cases clearly possessed the ability to use independent judgment in assigning employees and to effectively recommend alterations in their terms and conditions of employment, responsibilities which were never conferred on Molina. In Foster, supra, the individual determined by the Board to be a supervisor possessed all the job duties described by the IHE herein, but also assigned overtime duties, evaluated employees' work performance, effectively recommended wage increases and initiated "transfers of employees who were unfit to work on the job." In Perry's, supra, the Board affirmed an Administrative Law Judge's finding that an employee was a supervisor because she, in part, reported to the production manager which women in her crew were capable of planting, thereby effectively recommending which of them were to be transferred to higher paying positions.

managerial employee and should therefore be included in the unit of agricultural employees. In its opinion in National Labor Relations Board v. Bell Aerospace Co., Division of Textron, Inc. (1974) 416 U.S. 267, 288 [85 LRRM 2945, 2952], the U.S. Supreme Court held "that it was Congress[1] intent that [managerial] employees not be accorded bargaining rights under the [National Labor Relations Act (NLRA)]." That policy has been adopted by the ALRB. (Cal. Code Regs., tit 8, § 20355(a)(6).) However, long before the court's ruling in Bell Aerospace, supra, the National Labor Relations Board (NLRB) had routinely excluded managerial employees from the coverage of the federal labor law and has consistently defined managerial employees:

> as those who formulate, determine, and effectuate an Employer's policies . . . Moreover, managerial status is not necessarily conferred upon employees because they possess some authority to determine, within established limits, prices and customer discounts. In fact, the determination of an employee's 'managerial[1] status depends upon the extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy. (Eastern Camera & Photo Corp. (1963) 140 NLRB 569, 571 [52 LRRM 1068] .)

In General Dynamics Corporation, Convair Aerospace Division (1974) 213 NLRB 851, 857 [87 LRRM 1705], the NLRB affirmed its decision in Eastern Camera, supra, but cautioned that "... managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management." Subsequently, the NLRB explained further that, in determining managerial status, it will examine whether the

employees in question have discretion in the performance of their job duties and, in particular, the extent to which such discretion may be exercised independent of the employer's "set policies and guidelines" or whether the discretion is "restricted by fixed policies established by the Employer." (Simplex Industries, Inc. (1979) 243 NLRB 111, 112, 113 [101 LRRM 1466]; see, also, Cal. Code Regs., tit. 8, § 20355(a)(6); Hemet Wholesale (1976) 2 ALRB No. 24; Dairy Fresh Products (1977) 3 ALRB No. 70.)

Uyeda's terms and conditions of employment differ from those of other employees in three respects. Unlike other employees whose hours are 7:30 to 4:30, Uyeda works from 6:30 to 2:30. His starting time is dictated by the three hour time difference between Salinas and the east coast, situs of many of his early morning sales solicitations. Uyeda does not punch a time clock and receives a flat weekly salary while other employees are paid hourly. Onitsuka attributed the different treatment to the fact that Uyeda is so punctual and regular in his attendance that it is not necessary for him to use a time clock. The Employer provides employees with a medical plan but Uyeda elected to subscribe to a different program through a fraternal organization to which he belongs.

Flowers are ordered, selected, and shipped out the same day. Uyeda's work follows a standard pattern. He solicits customers by phone and takes orders until 9 a.m. He then goes into the cooler to select flowers to fill orders received earlier in the day, placing them on a cart which he rolls into the packing area. For each order, he prepares an inventory and a shipping

label. (Someone else prepares an invoice and statement and handles billings and collections.) A different individual packs the orders for shipment.

Starting at about 9:30 a.m., Uyeda cleans the flower storage buckets as well as the cooler. He then takes flowers which have been graded by others, groups them in buckets according to color, and places them in the cooler in readiness for the next day's orders. After that, Uyeda turns his attention to general cleanup and maintenance, including machinery repairs.

If a customer is not satisfied, and the matter involves one or two bunches of flowers, Onitsuka permits Uyeda to remedy the situation. But, if more than that is involved, or if the customer did not receive an order, Onitsuka assumes sole responsibility. Uyeda is authorized to quote prices on up to 1C boxes of flowers, but must confer with Onitsuka on all orders above that number. Onitsuka testified that Uyeda has never been told how much money the Company makes through sales nor is he given access to any matters relative to the Company's finances.

On these facts, it is clear that Uyeda does not "formulate and effectuate management policies by expressing and making operative the decisions of this] employer." Moreover, we cannot find that Uyeda has "discretion in the performance of [his] job independent of [his] employer's established policy." While we readily acknowledge the importance of Uyeda's work as the only sales employee, his duties are circumscribed by the Employer's close and constant supervision and by the review power which the Employer retains. Uyeda lacks authority to unilaterally quote

prices on large orders as he is "restricted by fixed policies established by [his] Employer." (General Dynamics, supra, 213 NLRB 851, 857.)

Although he worked on a schedule which differs from that of other employees, that factor was dictated by outside circumstances (i.e., the time difference). The fact that he was salaried *is* not controlling. Although Uyeda spends about 35 percent of his work day soliciting buyers and making up orders, the majority, or 65 percent, of his work parallels that of unit employees.

On similar facts, the NLRB declined to confer managerial status on two individuals notwithstanding the fact that they maintain customer contacts, quote prices on orders, schedule delivery dates, and handle customer complaints. (Vulcanized Rubber and Plastics Company, Inc., supra, 129 NLRB 1256, 1262. As explained in that case:

> Although their work may be of paramount importance insofar as customer relations are concerned, the record fails to establish that their day-to-day decisions and judgments, which relate to the order of production and delivery, involve the exercise of such a degree of responsibility and discretion in the fixing of pricing as to indicate the possession of managerial status.

We conclude therefore that Uyeda is not a managerial employee and that the challenge to his ballot should be, and it hereby is, overruled.

ORDER

In accordance with our Decision herein, the Regional Director is directed to sustain the challenge to the ballot of Enrique Garcia Huerta and to hold in abeyance the ballots cast by Matias Rodriquez, Jr., Ernesto (Daniel) Rodriquez, Pedro Rodriquez

and Ramon Solario.

The Regional Director is also directed to open and count the ballots of Mayumi Nishimoto, Pusae (Linda) Holbrook, Mike Moto, Masahiro Yoneda, Aldo Saldana, Steve Pacheco, Tom Pacheco, Jesus Molina Guevara and Jimmy Uyeda and to thereafter prepare and serve upon the parties and the Board a revised official Tally of Ballots.

Should the revised Tally indicate that the four remaining ballots are not outcome-determinative, the Executive Secretary is directed to certify the results of the election since no objections to the election are pending. However, if the four remaining ballots prove to be outcome-determinative, the Board will proceed to resolve such challenges.

Dated: July 14, 1989

BEN DAVIDIAN, Chairman[6/]

GREGORY L. GONOT

IVONNERAMOS RICHARDSON

JAMES L. ELLIS

[6/]The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

CASE SUMMARY

Salinas Valley Nursery,
UFW

15 ALRB No. 4
Case No. 88-RC-l-SAL

Background

On January 11, 1988, pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among all agricultural employees of Salinas Valley Nursery (Employer) in the State of California. The initial Tally of Ballots revealed 7 votes for the UFW, 2 votes for No Union, and 14 Challenged Ballots. As the latter were sufficient in number to determine the outcome of the election, the Regional Director (RD) of the Board's Salinas Regional Office conducted an administrative investigation. While all parties agreed that one of the challenges should be sustained, the RD determined that the 13 remaining ballots concerned issues which should be the subject of an evidentiary hearing.

IHE's Decision

Following a hearing in which all parties participated, the IHE recommended that the Union's challenges to the ballots of two employees be sustained, finding one to be a managerial employee and the other a supervisor and thus not agricultural employees subject to inclusion in the bargaining unit. The IHE recommended that the challenges to seven additional employees be overruled. With regard to four minors who worked during school vacations, three of whom were children of full-time employees, the IKE recommended that the Employer's challenges to their ballots be overruled. The IHE found that since they met the statutory definition of eligibility (i.e., they were employed in agriculture during the applicable pre-petition payroll period), the Employer's objection, based on age, was not legally cognizable under the Act.

Board Decision

Absent any exceptions thereto, the Board adopted the IHE's recommendation that challenges to seven of the ballots be overruled. In response to the employer's exceptions, the Board examined the job duties and the responsibilities of the alleged supervisor and determined that they did not satisfy the indicia of supervisorial status within the meaning of the Act and overruled the challenge to his ballot. The Board reached a similar result with regard to the alleged managerial employee, concluding that his work assignment was not such that he could be said to formulate and/or carry out management's policies. Having thus directed the RD to open and count nine of the challenged ballots, the Board decided to hold in abeyance the remaining four ballots and to consider them only if they prove outcome determinative following the issuance of a Revised Tally of Ballots.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
SALINAS VALLEY NURSERY,	)	Case No. 88-RC-l-SAL
Employer,	)	
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Petitioner,	)	
and	)	
AGRICULTURAL LABOR RELATIONS BOARD, SALINAS REGIONAL OFFICE,	)	
Intervenor.	)	

Appearances:

Frederick A. Morgan
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for the Petitioner

Clifford R. Meneken
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Salinas, CA 93907
for the Intervenor

Before: Marvin Brenner
Investigative Hearing Examiner

DECISION OF INVESTIGATIVE HEARING EXAMINER

On January 11, 1988, the Agricultural Labor Relations Board (hereainafter "ALRB" or "Board") conducted a representation election among all the employees of Salinas Valley Nursery (referred to hereinafter as "Employer" or "Company") pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (referred to hereinafter as "UFW" or "Union"). The Tally of Ballots showed that there were 23 employee names on the eligibility list that seven voted in favor of the UFW with two against. There were 14 challenged ballots. The UFW challenged nine persons on the grounds that they were not agricultural employees, that one was a supervisor, and that another was managerial. The Employer challenged four persons on the grounds that they did not work during the eligibility period, December 27, 1987 - January 3, 1988, and were not "employees" under California law because of their age and lack of permits. One person, Enrique Garcia Huerta, was challenged by the ALRB as not being on the list. (His challenge is not the subject of the present dispute). The Salinas Regional Director on April 13, 1988 concluded that a hearing should be held to resolve the issues raised, and the Executive Secretary so directed on June 6, 1988.

The hearing proceeded on the challenges on June 20 - 24, 1988. The Employer and Union were present at the hearing, as was the Salinas Regional Office of the ALRB which intervened in the case. All the parties were given the opportunity to participate fully in the proceedings, and post-hearing briefs were filed.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

I find that Salinas Valley Nursery, is an agricultural employer within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereafter "ALRA" or "Act") and that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act.

II. THE BUSINESS OPERATION!

The Salinas Valley Nursery is owned by George Onitsuka who has been operating this Salinas based enterprise for the past 16 years. Onitsuka grows roses and a few carnations on five acres and 190,000 square feet of nursery space. There are six greenhouses; there is also a packing shed. After the flowers are cut in the greenhouses, they are taken to the packing shed where they are graded, packed and shipped to buyers. There are also coolers in the packing shed which occupy about one third of the space. Also inside the packing shed is an office consisting of

[1]Hereinafter, the Union's exhibits will be identified as "U. _ and the Employer's exhibits as "Empl's." References to the Reporter's transcript will be noted as (Volume: page).

two parts, one part being utilized for sales where a Jim Uyeda is employed and the other part being used by the Onitsuka family. There is also an old trailer on the premises. Originally, the family lived in it, but currently the trailer is being used to house guests and at other times for rest and recuperation. (1:8-10.)

The number of employees ranges from 10-14 full time, and there are part time workers, as well. In January of 1988, there were 10 or 11 full timers plus around five part-time workers employed. The work week starts on Monday and runs through Sunday with the following Monday being payday. Onitsuka writes all the checks each Sunday evening. Timecards and a payroll are maintained.

In addition to his employees, Onitsuka himself works in the greenhouses and the packing shed. His wife, Akiko Onitsuka, works in the packing shed doing the same kind of work as the other packers. Their son, Yuji Onitsuka, is also employed at the nursery doing general work. (1:10-13; 111:44, 46-47.)

III. THE UFW CHALLENGES

A. Jimmy Uyeda - The UFW challenges this individual on the basis that he is a managerial employee.

1. The Nature of His Work

Jimmy Uyeda, around 57 years of age, has worked for George Onitsuka as a full time employee for over three years and is employed primarily in sales. When asked on direct examination what kind of work Uyeda did, Onitsuka responded, "[h]e handles

sales." (1:30.) In fact, Onitsuka hired him because of his previous experience in sales. Uyeda works alone six days a week and reports directly to Onitsuka. His working conditions and wages are different from other workers. He does not use a time clock and has no timecard.[2] Other workers' hours of work are from 7:30 a.m. - 4:30 p.m. Though Uyeda's nominal schedule is 6:00 a.m. - 2:30 p.m., In actuality, Uyeda does not work on the basis of hours but until his task is accomplished. (II:38, 40, 56; III:51, 53, 103, 112-115.) As Onitsuka pointed out in his testimony:

> "Uyeda is involved in sales. And so long as the sales end of the operation were conducted, it was sufficient for me. When the situation required, he would come in early and stay late, and do his job." (II:56.)

Uyeda is paid differently as well. He earns a salary of at least $400.00 per week (II:5, 60) (Empl's 3). He also receives a bonus of between $400.00 - 500.00 while most of the workers only receive $150.00 - $200.00.[3] (V:III-113.) The parties stipulated that Uyeda, over his period of employment, makes at least twice as much as the other workers. (III:86.)

On those rare occasions where both George and Akiko Onitsuka were away from the business premises, George Onitsuka

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[2]The parties stipulated that for the time period of January 1, 1984 through December 31, 1987, the Employer had no timecards for Uyeda. (III:116.)

[3]Onitsuka testified that he had no rigid formula in determining how much an employee should earn as a bonus and that it was generally just based on his thoughts. (V:lll-112.)

would ask Uyeda to be in charge[4] though Onitsuka testified that he never delegated any disciplinary authority to him.[5] (I:46.)

Uyeda has an office which is located in the new packing shed building next to where the Onitsukas work. It is basically a building within a building. It has glass walls and windows and is about 12' by 12'. It is close to the cooler where Uyeda does a lot of his work and is about 12 - 15 feet from the front door. (III:87.)

Uyeda begins his sales work early each morning by speaking to old or potentially new customers throughout the country in hopes of taking their flower orders. As orders are received, he begins to fill out a "layout sheet" (Empl's 10) which is a form for the flower order covering the size, quality, and total amount in the box for each order. He then begins to fill those orders by going into the refrigerator (or cooler) and personally selecting the specific flowers and arranging same by color, variety, size, and amount. No one but Uyeda has been trained to make selections of flowers for an order. After he

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[4]As Uyeda usually leaves at 2:30 p.m., Jesus Molina Guevara, infra, would be put in charge after that time. (I:46.)

[5]Uyeda testified that the Onitsukas had, except for a day or two, not been away from the property at the same time since he began working there. According to Uyeda, during that time no one was really in charge as everyone knew what to do. Uyeda testified that he did not go out to the greenhouses and supervise the workers there nor did he exercise any supervisory control over any of the workers in the packing shed. (III:92-93.)

makes the selections, he completes the filling out of the layout sheet by designating the grade (medium, long, fancy or extra fancy) colors, and number of bunches in the box. (III:28-29, 99-100, 111-112.)

The flowers selected, Uyeda next places them on carts and personally pushes the carts out of the cooler and into the packing area where there are tables. Only Uyeda takes the flowers to the tables for packing. At that point workers pack the flowers, tie them, and put them in containers. Uyeda sometimes assists in the packing .

Uyeda makes arrangements to have the flowers shipped. (The trucks arrive around 9:30 a.m.). After the packers pack what Uyeda had previously selected, Uyeda slaps a shipping label en, making sure the right labels are on the right boxes. Having checked the labels, Uyeda next makes up the invoices for the orders putting down the amount and the price.[6] Uyeda checks the invoices with what is in the boxes, e.g., numbers, sizes, colors, and makes sure they go out on the right trucks. Meanwhile, this process goes on continuously throughout the early morning. (I:30-31, 33-35; II:3, 28-33; III:87-90, 99-101.) (Empl's 9.)

After this process is over, the next thing that Uyeda does is to clean the cooler, meaning he empties the buckets of

[6]However, Uyeda does not fill out the invoices completely as Mayumi Nishimoto does this when she later prepares the invoices and statements, infra.

water that contain the flowers, refills them again, and sets everything up for the next day, i.e., takes graded flowers, puts them in the buckets and arranges them. In this way he is ready for tomorrow's sales orders. Then he works on the floor around the grading and bunching for 2-3 hours a day, and sometimes he works for the maintenance department where he repairs "go carts" for the grading machines. He spends about 1/2 to 1 hour a day doing the maintenance or repair work. (III:90-91, 105; 1:30-32.)

Uyeda testified that he had no other duties at the nursery and did not go into the greenhouses to work. (III:92.) However, every few days he would go visit the greenhouses to check on the colors and amounts of flowers making mental notes of what the production was going to be like for the next couple of days or even months. For example, he would look at the rose bushes and count the number of flowers on them to see when they were just about ready to bloom. All this activity related to his sales work in that it let him know what he had to sell. If there were not enough to fill an order, he would tell the customer that he just couldn't do it. (III: 101-102, 104.)

Uyeda testified that except for particularly large orders (10 boxes or more), he did not need to get Onitsuka's prior approval before making a sale and starting the process leading towards shipment. If the order were 10 boxes or more he would need only to discuss the price with Onitsuka. (III:102-103.) If an order needed filling but there just weren't sufficient flowers

available, Uyeda would not talk to the workers about speeding up production, but would report the matter to Onitsuka. (III:113-114.)

2. Analysis and Conclusions of Law

Was Jimmy Uyeda a managerial employee who should be excluded from the bargaining unit?/

The National Labor Relations Board has held that managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. . . .Managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management." General Dynamics Corp. (1974) 213 NLRB 851, 857, 87 LRRM 1705, 1715.

Unlike supervisors, managerial employees who may have nc supervisory function are not explicitly excluded from the protections of the National Labor Relations Act. Nevertheless the

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7/The dispute over Uyeda has to do with whether he is a managerial employee not whether he is engaged in agriculture. The Act's definition of "agriculture" contained in section 1140.4(a) would encompass the work that Uyeda performs. See Hemet Wholesale (1976) 2 ALRB No. 24; Rod McLellan Co. (1968) 172 NLRB No. 157, 68 LRRM 1547.

U.S. Supreme Court has held that such employees are not covered by the federal Act as a way *of* insuring that they do not divide their loyalties between management and the union. NLRB v. Bell Aerospace Co. (1974) 416 U.S. 267, 85 LRRM 2945. The Court cautioned that "actual job responsibilities, authority, and relationship to management" rather than specific job title are determinative of which employees were "managerial". Morris, The Developing Labor Law (2nd ed. 1983) pp. 1457-58.)

In Simplex Indus., Inc. (1979) 243 NLRB 1111, 101 LRRM 1466, 1467-68 the sole buyer for a paper products manufacturer who could initiate new contracts or change suppliers, had authority to execute purchase orders, could schedule production, and who had a direct supervisor who ran the department was held to be managerial. See also ITT Grinnell , (1980) 252 NLRB 584, 106 LRR.M 1024 where an accounts receivable collection coordinator was said to be managerial. While this employee could only make recommendations regarding a customer's credit level, 60 percent of his time was spent resolving disputes over already invoiced amounts and making sure adjustments, functions which required the exercise of discretion and regular customer contact.

Uyeda is the nursery's sole employee in sales, an essential component of the business enterprise. He spends most of his time in sales or sales related work. Any sales policy directives from the owner, George Onitsuka, are effectuated by him. Uyeda calls on customers and solicits new business. He has

total discretion over what to do with all orders under 10 boxes and over that amount he only needs to discuss the price with Onitsuka. He has total discretion over all other activities from how and when the order is to be filled to how it's to be shipped, including monitoring the entire process all along the way and documenting same for the Company's records. Later, he goes to the greenhouses to review the production and stock on hand.

I believe that Uyeda's independent work structure indicates a wide discretion on his part to carry out management's policies, that he is closely aligned with management, and that the challenges to his ballot ought to be sustained on the grounds that he is a managerial employee and therefore, should be excluded from the unit.[8]

I recommend that the UFW's challenge to Jimmy Uyeda be sustained.

B. Jesus Molina Guevara

1. The Nature of His Work - The UFW challenges this individual on the basis that he is a supervisor.

Jesus Guevara does fertilizing, irrigation and work in the greenhouses. He works six days a week. (II:44; IV:37.)

[8]The Employer argued at the hearing that Uyeda could not be challenged on any grounds other than what he was challenged for at the time of the election—that he was not an agricultural worker. This argument was not made with the same vigor in its Brief, but it was alluded to (Post-Hearing Brief of Employer, pp. 6-7) so I assume the Employer still maintains it. The Employer's position has been specifically rejected by the ALRB in prior cases. See, e.g., Jack T. Bailie Company, Inc. (1978) 4 ALRB No. 47, Rancho Packing (1984) 10 ALRB No. 38, IHED, p. 39: Crown Point Arabians (1980) 6 ALRB No. 59, fn. 6, p. 6.

a. Fertilizing - According to George Onitsuka, Guevara makes out the schedule of how much and what fertilizer is to be applied and informs the workers of the schedule he has set up for them. He directs the work of all workers participating in the fertilizing process and trains new workers. (II:38-41, 48-49; III:46.)

Guevara testified that he would first show the workers how to spray and use the fertilizer and then tell them what greenhouses were going to fertilized. Guevara testified that he himself never sprayed except under two circumstances: 1) if a worker had not sprayed correctly, he would help him redo it or 2) if the nursery were seriously undermanned, he would lend a helping hand. (IV:38-41, 50-51.)

The flowers are cut early in the morning. Then the fertilizing, if necessary, follows and is normally completed in the morning in about 3/4 of an hour. According to Guevara, the need for fertilizing depends on the weather. If it's hot, it may be performed seven days a week; but in the winter, it would be done less often, maybe only twice a month. Basically, fertilizing (like irrigating) is done whenever needed. (IV:38-42.)

When the fertilizing work is over-usually 10:30 a.m. -11:00 a.m., each worker then proceeds to the greenhouse he is in charge of. (IV:41; III:44-46.))

b. Irrigation - Guevara is the only irrigator. The watering is done almost daily because one greenhouse may be

watered one day and then another the next. (IV:40-41.) It is done in the morning after fertilizing. Guevara turns the pumps on to assure that the water is flowing and constantly watches the watering. When it is finished, he proceeds to the next greenhouse. Generally, he spends about 3-4 hours a day watering, more often when the weather is hot. According to Onitsuka, Guevara has sole and complete responsibility over the irrigation, always works at this task alone, and makes his own decisions regarding what is to be watered. Onitsuka further testified that Guevara coordinates the fertilizing and watering with the other workers and writes out all the details of what is to take place and what has taken place. Based upon his schedule, he makes the decisions to do the fertilizing and irrigation. (I:41-42; II:38-42, 48-49; III:46; IV:40-41.)

Guevara testified that after the irrigation, he goes to the greenhouses and instructs the workers there to do whatever is needed, e.g., picking up the plants to pull them in, debudding. These instructions, however, are unnecessary for most of the workers who work regularly in one of the greenhouses and know what needs to be done. There is no need to check the work of these workers. But as to the new workers, Guevara tells them or demonstrates for them the work requirements. (IV:41-42, 49-50, 59.) The same is true as regards the cutting of the plants and flowers. For those who are regulars and know what to do, there would be no reason for him to instruct them; for those that were

new or didn't know the procedures, Guevara would tell them what to do. (IV:49.) In addition, sometimes, while in the greenhouses, Guevara would ask one of the workers to clean up.

Guevara also does repair work. For example, when the plastic covering on the greenhouses tear or when a plastic sheeting has to be changed, Guevara sees to it that this is accomplished. If it's a small job, he does it himself; but if it's something big, he calls in others and directs their work. There is no need for him to check first with Onitsuka before securing the labor. If additional equipment is necessary as part of the repair or replacement, he consults with Onitsuka. (II:42-43; IV:49-53.)

In short, Guevara directs the fertilizing and irrigation and oversees in general other projects such as debudding, cutting, cleaning, and repair work. There are no other supervisors above him. He reports only to George Onitsuka. (III:44-46.)

As pointed out by Onitsuka:

> A "Fertilizing is a most important activity. So when that fertilizing is being done, Mr. Guevara is the 'mayordomo'[9/] However, there are other tasks that must be done involving group activities. In those instances, Mr. Guevara is an acting leader and works together with the other workers.
>
> Q So when he's working as a team leader or a foreman with the group, is he directing the work? Is he telling them what needs to be done, or how it needs to be done, or when they're going to work on it?
>
> A When the workers are working as a group, Mr. Guevara

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[9]The interpreter indicated that "mayordomo" was the Spanish word for foreman. (IV:35.)

is a team leader. But once that particular task is done and the workers go back to their own tasks, then Mr. Guevara does not function as a team leader. He is not that type of a person.

Q When he functions as a team leader, does he inform the workers what they need to do?

A When the workers are working as a group, based on his experience, Mr. Guevara does help the other workers to do this or to do that.

Q So when the workers are involved in fertilizing and when they're involved in group activities, Mr. Guevara directs their work, correct?

A Yes, that is correct" (II:49-51.) 2.

The Offer to Become Foreman

Onitsuka testified that he spoke to Guevara in July of 1987 about becoming a foreman because he had been trained in fertilizing and irrigation, had a lot of experience, and that business decisions regarding the amount of fertilizer and amount of water had to be made by someone, otherwise, the workers would not be able to perform their assigned tasks. There was no other foreman that Guevara was replacing. (II:38-41.; III:46.) According to Onitsuka, Guevara agreed to become foreman at that time. Onitsuka then told the workers that Guevara was the "mayordomo", which he understood to mean foreman or "team leader."[10] Guevara's pay was thereby raised by .50 cents per

[10]Onitsuka explained that in his mind there was a difference between a foreman and a supervisor, that a foreman was more akin to a "crew leader" and that this was what he had asked Guevara to become. (II:39.) Later, he included the term "team leader" in the definition. (II:47.)

hour; his bonus of $200.00 - $300.00 a year was also more than the other workers. Onitsuka told the workers at the same time that if he wasn't on the premises, Guevara[11] would be in charge in his absence. (V:88.)

However, according to Onitsuka, Guevara's duties remained the same that they had been for the past 5-6 years, that he was never requested to do anything as a supervisor, and that he never exercised any supervisorial powers. In addition, Onitsuka testified that Guevara punched a time clock and that he had never hired or fired any employee. On two occasions Guevara's hiring recommendations, one a relative of his and another who lived across the street from him, were accepted. But Onitsuka testified that others had recommended people for hire, as well.[12] (I:42-45; II:5, 38, 46-51; V:lll-113) (Empl's 3.)

In any event, after he had become foreman, Guevara changed his mind and, in September or October, 1987, he told Onitsuka that he was no longer interested in the position as he did not want that kind of responsibility. However, Onitsuka never

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[11]Quevara confirmed that he handled work-related problems if the Onitsukas were away. (IV: 53.)

[12]Guevara testified that he had never hired or fired anyone or recommended same, that he had not changed the vacation or leave schedule for any employee, that he had never given a worker permission to leave work for personal or medical reasons, and that if anyone ever asked for such permission, he would always tell him/her to speak to Onitsuka about it. (IV: 43.)

announced to the workers that Guevara was no longer the foreman, and Guevara was not returned to his previous lower salary. His higher bonus also remained the same. (II:54; IV:59-60.)

Onitsuka testified that he no longer considered Guevara a "mayordomo," and that he had hired a supervisor, Salvador Pineda, around April of 1988. But he added that Pineda was not doing any of the work that Guevara had previously done and that Guevara was still doing the same work as before even though he no longer had a title.[13] In this regard, Onitsuka acknowledged that when the important task of fertilizing was being carried out, Guevara was still the "mayordomo" and still in charge of fertilizing. (I:40; II:49-52; IV:51.) When asked how many supervisors, foremen, crew leaders, or crew bosses Onitsuka had at the time of the election, he replied, "With Jesus as team leader and myself. There were no other supervisors." (III:45.)

3. Analysis and Conclusions of Law

Supervisors are not permitted to vote in ALRB conducted elections to determine whether the agricultural employees desire to choose a bargaining representative to represent their interests collectively. The Agricultural Labor Relations Act's definition of "supervisor" (Labor Code section 1140.4(j)), which is modeled

[13]According to Guevara, nothing has changed in his job duties since he first started working for the nursery in 1977; and these job duties, despite his short stint as "mayordomo", have remained the same up to the present. (IV:37-38, 43, 51-52, 56-57.)

after the definition that is found under the National Labor Relations Act, is as follows:

> "The term "supervisor[1] means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The National Labor Relations Board will usually find that one who possesses the authority to make judgmental personnel decisions is a supervisor, even though that authority is rarely exercised. Even a person who spends most of his time in normal production or maintenance duties may be a supervisor if he exercises or is merely authorized to exercise any of the functions mentioned in the statutory definition. To be classified as a supervisor, a person need have only one or more of the types of authority mentioned, not all. German, Basic Text on Labor Law (1976) p.36.

In Foster Poultry Farms (1980) 6 ALRB No. 15 supervisorial status was found even where the individual was paid hourly and spent 50 percent of his time performing the same type of work as the other crew members where this individual directed the work of 5-15 employees, oversaw the installation of the plumbing systems in the poultry ranches, assigned workers to specific tasks, corrected their mistakes, ordered materials for the systems, made certain decisions when the job supervisor was not

available, and was paid $.75 to $1.00 per hour more than the employees under his direction.

In Perry's Plants, Inc. (1979) 5 ALRB No. 17, ALJD, p.32 the evidence established that an individual's work was accomplished pursuant to a daily list provided to her by the production manager wherein he would indicate the identity of the plants to be repaired. When several priorities were listed, this individual would decide which job should be done first and by whom; and she directed the employees in the manner in which they were to perform the work. If there were any mistakes in repairing the plants, she would correct the work or direct that it be corrected. Although she spent around 90 percent of her time doing the same work as the other women in the crew, she also directed and taught the others how to do the repair work and occasionally, the planting. Supervisorial status was found.

In the case at bar, there does not appear to be a dispute that at least insofar as the fertilizing is concerned, Guevara functions as a supervisor. He independently decides what needs tc be done, maintains schedules, instructs the crew how and where to do it, and directs their work. He also trains new workers. He reports only to the owner.

There is a dispute about his other functions, but I find him to be a supervisor in these activities, as well. Thus, after the fertilizing, he moves on to the irrigation which he operates completely on his own and again is subject only to general

guidelines, if any, set forth by the owner. Writing out the details of his activities, he is in charge of coordinating both the fertilizing and irrigation activity.

Next he goes to the greenhouses where he oversees all activity and does whatever is needed. Granted that most of the time the seasoned employees who work there do not need any direction from him nor is there any need ordinarily for him to check their work. Nevertheless, if conditions require his direction or monitoring, he has the authority to exercise these functions. And, in the case of a not so seasoned employee, Guevara would instruct him or show him what to do.

Guevara also directs the repair work deciding when it is to be done, how it is to be done, and assigning workers to such tasks, when necessary. In most cases, he just does so without any need to check with the *owner* first. And if additional equipment or replacement parts are needed, it is Guevara who makes that determination and Guevara who informs the owner about the situation,

Guevara's selection as the sole foreman or "mayordomo" with concomitant raise in salary and bonus only gave recognition to his status based on his past duties, which have remained the same until the present time. The owner, George Onitsuka, realized the important function Guevara had been serving and his importance to the running of the nursery operation. Notwithstanding Onitsuka[1]s rather confusing attempts to draw distinctions between supervisors, foremen, crew leaders, crew bosses, and team leaders,

the fact remains that Guevara's function was to exercise authority requiring him to use independent judgment, thus statutorily excluding him from the bargaining unit.

I recommend that the UFW's challenge to Jesus Molina Guevara be sustained.

C. Part-Time Workers - The UFW challenges the individuals named below on the basis that they are not agricultural workers and were hired only so that they could vote in the election.

George Onitsuka testified that beginning in 1988 he started keeping payroll records for all workers including part-time employees. (II:8-9.) Prior to 1988, he did not keep records for the part-timers because work was most often given to people only when they came by the nursery asking for work. For example, his son's friends would sometimes come over, infra, and would end up helping his son finish his work early so they could all go out together. As compensation, Onitsuka would treat them all to dinner. For others like Linda Holbrook, infra, he would give flowers as payment. (II:10.)

Onitsuka testified that at the time he received his copy the Petition for Certification, January 4, 1988, he had on his Payroll part-time workers and that in fact, he had been employing part-timers for at least the preceding five years. (I:14-17.)

1. Mayumi Nishimoto

a. The Nature of Her Work

Mayumi Nishimoto is a U.C. Berkeley college student who has traveled down to the nursery only on weekends for the past

two years to prepare monthly invoice statements reflecting sales made and amounts owed by customers.[14] (II:3-4.) (Empl's 9, p. 2.) Nishimoto does not punch a time card and is paid monthly.[15] Her check of January 3, 1988 for $60.00 (Empl's 2) represents work performed on the weekend of January 2 and 3, 1988. Almost all of her work is performed in the old trailer, located around 400 feet from the packing shed office. Nishimoto reports directly to George Onitsuka. (I:25-29; II:21-22; III:51.)

b. Analysis and Conclusions of Law

It appears that Nishimoto is an eligible voter whose vote should be counted. In Koyama Farms (1984) 10 ALRB No. 4 eligibility was found where the employee performed the regular duties of a bookkeeper and office clerical which included keeping track of accounts payable and receivable and maintaining journals and ledgers. The Board thus found, in effect, that this worker was an agricultural employee as her work duties were incident to and in conjunction with the employer's agricultural operations. And in Dairy Fresh Products, Co. (1976) 2 ALRB No. 55 an office

[14]On cross-examination for the first time Onitsuka testified that Nishimoto also did carnation debudding if she were to finish up the invoice work early. (II:26.) This testimony sounded to me like an afterthought and smacked of insincerity, I do not credit it.

[15]The parties stipulated that the Employer has no timecards or payroll ledgers for Nishimoto from January 1, 1986 through December 31, 1987. (III:116-117.)

clerical described as the "bookkeeper" whose duties included inventory reports and the maintenance and updating of records was likewise said to be eligible to vote.[16]

I recommend that the UFW's challenge to Mayumi Nishimoto be overruled.

2. Fusae (Linda) Holbrook

a. The Nature of Her Work

Linda Holbrook worked at the nursery as early as 1981 and thereafter from time to time through 1987 mainly grading the No. 2 flowers.[17] However, no checks or timecards appear for her in Company records.[18] For the most part she babysat her three

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[16]It is unclear from the UFW's Post-Hearing Brief what its argumeni against Nishimoto's eligibility is. (Originally it had claimed that she was ineligible because she was not an agricultural employee. (Regional Director's Report and Notice of Investigative Hearing on Challenged Ballots, April 13, 1988). The UFW does not appear to now be arguing that Nishimoto is not an agricultural employee. Nor does it contend that part-time employment affects an employee's eligibility to vote. (UFW's Post-Hearing Brief, pp. 36-37.)

[17]Grading consists of naming the different sizes of the flowers as long, fancy, extra fancy etc. Number 2 grading involves flowers that cannot, for whatever reason, be shipped out so they are sold to flea markets or similar business operations. Akiko Onitsuka worked in the grading operation in the new packing shed and directed other workers in this work, including Holbrook. (I:18, III:51-52, 105.)

[18]The parties stipulated that the Employer had no payroll ledgers for Holbrook from January 1, 1984 - December 31, 1987 and had no timecards for her from January 1, 1987 through December 30, 1987. However, there do exist cancelled checks beginning on December 31, 1987. (III:116-117.)

grandchildren born during this period so her work was spotty at best. When she was employed, infrequently though it was, e.g., in 1981, only about once a month, in 1982, once or twice a month, and in 1983 and 1984, less than once a month, she preferred to receive payment for her services in flowers (not cash) which she donated to local charities. She was not called to work during this period; she would just show up - sometimes would just be visiting the family - and offered to do work. (I:23-25; 11:15-20; III:57-58; IV:62-68)

George Onitsuka testified that because of special orders that had come in around the 1987 Christmas holidays which had to be filled, Holbrook was called and asked to report to work. Akiko Onitsuka testified that she personally called Holbrook around the middle of December. (III:57-58.)

Holbrook testified that she thought she had received the call from Akiko Onitsuka earlier in December but that her first and only work day of 1987 occurred on December 31. According to her, it was now easier to return to the nursery to work as her grandchildren were older. In addition, owing to a recent interest in the game of bingo, she now wanted to be paid only in cash. In fact, she received a check for the pay period ending January 3, 1988 for $15.75 and also received a number of checks thereafter for work performed later in 1988. (I:18-23; II:21-22; IV:63-66) (Empl's 1 and 2.)

b. Analysis and Conclusions of Law

The UFW had earlier challenged Holbrook on the grounds that she was not an agricultural employee. (See Regional Director's Report and Notice of Investigative Hearing on Challenged Ballots, April 13, 1988). At this time the UFW contends that Holbrook was hired purely for the purpose of voting in the election, an unfair labor practice. (UFW's Post-Hearing Brief, p. 37) (See Labor Code section 1154.6.)

The evidence is undisputed that Holbrook had worked intermittently in the past for the Onitsukas as an agricultural worker going back as early as 1981 though not for cash. Though the UFW finds it suspicious that suddenly in December, 1987 she decided she wanted to be paid by check, I frankly was impressed by her demeanor and believe she was telling the truth when she indicated that cash was important to her now that she had developed something of a (minor?) bingo gambling habit. In any event, even if she had continued to be paid in flowers, I do not see where that would have detracted from the fact that she continued to be an employee of the nursery.

Furthermore, there is no evidence that Holbrook was not needed when called back to work. And significantly, there is no evidence that the Onitsukas were aware of any UFW organizational activity at the time Akiko Onitsuka called Holbrook to return; thus, how could she have been hired purely for the purpose of voting in the election?

I recommend that the UFW's challenge to Linda Holbrook be overruled.

3. Yuji's Friends - Mike Moto, Masahiro Yoneda, Aldo Saldana, Steve and Tom Pacheco

a. The Nature of Their Work

George Onitsuka testified that it was necessary to hire part-time workers for a special project that happened to occur at the end of December, 1987. According to Onitsuka, he had been building a new cooler in the packing shed and in order to do this the cement floor of the packing shed was broken up leaving a residue of cement blocks which had to be removed and the area cleaned up. The cement slabs, some of which were large and required more than one person to lift, had to be moved by tractor to the area where the trailer was located. Therefore, Onitsuka instructed his son, Yuji, to employ some people to work with him (Yuji) to remove the blocks. Yuji hired his friends, Mike Mota, Masahiro Yoneda, Aldo Saldana, and Steve and Tom Pacheco;[19] and they were all involved in this project between December 26, 1987 and January 3, 1988. In addition, they also did weeding around the greenhouses, cleaned up the packing shed, and

[19]It appears that all of the above worked at the nursery from time to time before December 26, 1987, only they were not paid in cash. The parties stipulated that prior to December 26 the Employer had no payroll ledgers, timecards or canceled checks for any of these young men. (III:116-117.) Beginning on December 26 cash payments, as compensation for their work, were made for the first time.

moved boxes within the shed. (I:14-17, 50-57, 61-62; III:47-48) (Empl's 4, 5, and 6.) The work of moving the cement slabs was performed on at least four days as follows:

December 26, 1987 - Steve Pacheco, Tom Pacheco and Yuji folded papers for the flowers. Steve Pacheco testified he was paid in cash for the first time. On prior occasions he had done cutting, packing, sorting, and debudding. As a friend of the Onitsukas', he would simply go over to their house after work where he was paid for that work by being treated to dinner. (III:72, 79-80.)

December 31, 1987 - Mike Mota, working with Tom Pacheco [20] and Yuji, moved the cement blocks and shoveled dirt over potholes. He was paid in cash which marked the first time this had occurred. On the prior occasions when he had worked at the nursery cleaning up and sweeping he had worked for meals or other treats. (IV:15-16, 20-23.)

Masahiro Yoneda also worked on that date. He testified he had dropped by the nursery to see his friend Yuji and had ended up helping out for around two hours. (IV:5-6.)

January 2, 1988 - Steve Pacheco, Masahiro Yoneda, and Yuji moved the cement blocks and then cleaned up the packing shed.

[20]The parties stipulated that Tom Pacheco only worked for the Employer on two occasions, December 31 and December 26, 1987. (II:62-64.)

(III: 70-71, 74.) Yoneda testified he was paid for his work on January 2, by check (Empl's 7), but that this was the first time. He had worked for the nursery on other occasions but had always been paid by free meals or accompanying the family on ski weekends or vacations. (IV: 8-9; 1:58-59.)

January 3, 1988 - The parties stipulated that Aldo Saldana worked at the nursery on January 3, 1988 and also on December 26, 1987. (II:65.) (Empl's 11 and 12.)

b. Analysis and Conclusions of Law

As in the case of Holbrook, the challenges to the eligibility of Mota, Yoneda, Saldana, and the Pacheco brothers are not based on the fact that they were part-time workers or that they were supposedly not engaged in agricultural work when they moved the concrete slabs[21] (though that was the original objection),[22] but rather on the theory that they were hired specifically for the purpose of voting in the election (UFW's Post-Hearing Brief, pp. 36-37).

The UFW makes two arguments in support of this proposition. First, it argues that Socorro Rodriguez and Matias

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[21]I find this was agricultural activity. See Crown Point Arabians, supra (1980) 6 ALRB No. 59 where workers who performed incidental tasks such as maintaining facilities and mowing lawns in connection with an agricultural operation, a stud farm, were found to be engaged in agricultural work.

[22]See Regional Director's Report and Notice of Investigative Hearing on Challenged Ballots.

Rodriguez Sr. testified that they had never seen any of these young men working at the nursery prior to the election. Second, it argues that even if they had "worked" there, it was for non-monetary compensation. Therefore, it was especially suspicious when these individuals began to receive their pay by check for the first time during the eligibility period.

Yoneda, Mota, and Steve Pacheco all testified that they, as well as Tom Pacheco and Aldo Saldana, worked for the nursery prior to and during the eligibility period. George Onitsuka corroborated and added to this testimony. I credit all of it. Just because the Rodriguezes may not have seen them on the premises does not mean that they weren't there working. Nor is there any evidence that the moving of the cement blocks project was a phony operation designed specifically to create jobs for these individuals just so they could vote in the election. Nor is there any evidence that the project was delayed for this same purpose. As a matter of fact, the work on this task actually began on December 26 (not December 27), a date outside of the eligibility period. As was true of the Holbrook situation as well, the UFW had the burden of establishing, as part of its non-eligibility argument, when and under what circumstances Onitsuka learned of the Union organizing campaign so as to support its position that he specifically put people to work in the week preceding the Petition filing on January 4 so that they would be eligible to vote. But there is a failure of proof on this point.

See TNH Farms (1984) 10 ALRB No. 37, p. 3, fn. 2; Miranda Mushroom Farms, Inc. (1980) 6 ALRB No. **22,** pp. 6-7.

As to the second argument, I agree that the record contains no explanation (unlike in Holbrook's case) as to why these friends of Yuji's who usually took their compensation out in pizza or family vacations suddenly decided (or had it decided for them) to start getting paid in cash. But I simply cannot allow myself to speculate on the reasons. Again, the burden was on the UFW to produce the evidence that would bring into question the motivation behind the fact that checks suddenly became the method of payment for these workers in late December, 1987. It did not carry that burden.

I recommend that the UFW's challenge to the ballots of Mike Mota, Masahiro Yoneda, Aldo Saldana, and Steve and Tom Pacheco be overruled.

IV. THE EMPLOYER'S CHALLENGES

A. The Children's Eligibility

1. The Pre-Election Conference, January 7, 1988

Thomas J. Nagle has been a Board agent since 1981, was the agent in charge of the election at Salinas Valley Nursery on January 11, 1988, and in that capacity, was also in charge of the pre-election conference on January 7. According to Nagle, the Company had two representatives at that conference, a Jim Uchida and a Steven Highfill. Both had signed the "Attendance Roster" (U.3) as Employer representatives. Specifically, Uchida, in the

presence of Highfill, informed Nagle that he was there to represent the Company. Nagle testified that both Uchida and Highfill participated in the meeting and spoke up in response to his questions. (IV:74-77.)

Nagle further testified that at the pre-hearing conference, one of the matters raised concerned the eligibility of four children who, it was claimed by the UFW, had worked during the eligibility period but were not on the eligibility list.[23] According to Nagle, Uchida, speaking on behalf of the Company, indicated that George Onitsuka had mentioned these four children, that they had talked about it, and that in Uchida's opinion these kids were too young to vote and for that reason were not included on the list. Nagle also testified that at no time during the pre-election conference did any Company representative deny that the children had worked during the eligibility period. (IV:79-81, 120-121.) (See also the testimony of UFW representative, Lupe Castillo, V:2-5.)

According to Nagle, the Union representatives indicated they had the names of the four children, but Nagle told the parties he needed confirmation from the Company to which Uchida responded that he would call him back within the next hour.

[23]UFW representative Ifrael Edeza testified that he was the one that mentioned this to the Company representatives and that they indicated they were already aware of it. (V:65-66.)

(IV:81-82.) Nagle then described the return phone call from Uchida as follows:

> "He said that Mr. Onitsuka was standing there next to him, and he confirmed that the four kids had worked during the eligibility period. Mr. Onitsuka's position was that they were eligible to vote, the company was in agreement that they were to be included on the list.
>
> "During this conversation there were short breaks where Mr. Uchida would speak with the person standing next to him, in Japanese, and speak to me in English. . . .1 was intending to go to the Company the next day to distribute the notice and direction of the election, and I informed the Company that when I did that the next morning, I would like to pick up a list with those names and their addresses, the names of the four individuals and their addresses who had worked during the eligibility period." (IV:82.)

Nagle testified that the next day, January 8, he went to the Company's premises and spoke personally to Onitsuka who gave him the children's names[24] and indicated that they had indeed worked on some of the days of the eligibility period. Onitsuka handed him a handwritten[2/] note of two pages with the date of January 2, 1988[26] on it. "He (Onitsuka) indicated to me that these four kids - he said these four -

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[24]The children were Matias Rodriguez, Jr., Ernesto (Daniel) Rodriguez, Pedro Rodriguez and Ramon Solario.

[25]0nitsuka told Nagle that the writing in black pen on side 1 of page 1 of Union 4 (where the initials appear) was written by Uchida (IV:115).

[26]Nagle testified that so far as he knew, this January 2 date came from the Employer. (IV:112.) Nagle denied there was any discussion about any January 7 date. (IV:117.) (See infra.)

these children are eligible to vote, that they worked in the eligibility period, and they were eligible to vote."[27] (IV:84-86.) (Parenthesis added.)

Nagle then asked Onitsuka to place his initials ("G.O.") on the page with the January 2, 1988 date on it, which he did, in black pen and close to where the date appears. (U.4.) Nagle placed his initials in green pen under and to the right of the date. (IV:85,115.) (U.4.) Nagle testified that there were two reasons he requested the initials. First, whenever there were to be additions to an eligibility list that was to be used at an election, he felt it was a good idea to have the parties[28] initial same as this would show agreement. Second, in this particular case, the "2" on Union Exhibit 4 was marked in a way that suggested to Nagle that it had been marked over for some reason so "I asked him: 'Are you sure about this date?[1]. And he said 'Yes.'". (IV:86,117.)

Nagle testified that there was no change in the Company's position regarding the children's eligibility between the time he talked to Onitsuka on January 8 until the

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[27]Nagle testified that when he later spoke to the children's mother, Socorro Rodriguez, she told him that the children had worked during the eligibility period but denied that it was on January 2. (IV: 105-106.) (See infra.)

[28]Nagle also obtained the initials of UFW representative, Ifrael Edeza. Edeza testified that shortly after the pre-election conference, Nagle gave him Union Exhibit 4 with the children's names on it and asked him if those were the names of the children who had worked during the eligibility

day of the election, January 11. At that time Fred Morgan, attorney for the Company, told Nagle that the Company would challenge the children's vote on the grounds that they were not eligible because they had not worked during the eligibility period. When Nagle pointed out that this was a contrary position to what the Company had represented a few days before, Morgan acknowledged that this was a change but stated that nevertheless, there would be a challenge.[29] (IV: 86-92.)

Onitsuka admitted during his testimony that Uchida had helped him prepare the original eligibility list that was sent to the ALRB (1:69-70; III: 13-15). Onitsuka initially testified that at the time he reviewed the eligibility list with Uchida, he recalled the Rodriguez children and Ramon Solario being mentioned, but he could not recall what was said. (III: 15.) He then testified that the children were

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(Footnote 28 Continued)

period but whose names had not appeared on the list. Edeza replied, "yes". Nagle then asked him to initial the document, which he did with an "I.E." in black pen. (V: 68-69, 77.) (U.4.)

[29]The Company also based its objections on two other points. One was that the children's names were not on the eligibility list. However, Nagle pointed out that this could not be so as the sheet of paper given to him by Onitsuka with the names of the four children on it (U.4, p. 1) was stapled and thereby incorporated into the eligibility list. (IV:90.) The Company also argued that the children were not agricultural workers. (IV:108.)

mentioned but that he told Uchida that they "were not employees, therefore, their names were not put on the list." (III:17.) He next testified he did not discuss anything with Steven Highfill prior to the pre-election conference about the Rodriguez children or Solario or whether they had worked between mid-December of 1987 through January 3 of 1988 (III:13). He also testified he never reviewed the eligibility list with him.[30] (III:13-15.)

With respect to the pre-election conference, Onitsuka testified that it was Highfill who went to the conference on the Company's behalf. As to Jim Uchida, Onitsuka testified that he was the son of a nurseryman who had recently gone through the experience of having a union election petition filed on his property and that although Uchida was present at the conference, he (Onitsuka) did "not especially" ask Uchida to represent him there.[31] According to Onitsuka, he had heard that the names and birth dates of the children were mentioned by the UFW representatives, but he didn't know in what context. Onitsuka confessed that to this

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[30]Of course, the list had already been reviewed with Onitsuka[1]s other representative, Uchida, who helped prepare it, and the children's eligibility had been discussed with him, as well.

[31]Nagle testified that at no time in his conversations with Onitsuka was he told that Uchida was not a Company representative. (IV:88.)

day he really didn't know what had happened at the conference. (III:9-17.)

Onitsuka testified that he had no idea how the children's names got on Union Exhibit 4 (1:69-70), in effect, denying Board agent Nagle's testimony that Onitsuka personally gave him the names of the children when he visited the nursery's premises the day after the pre-election conference. Onitsuka did recall Nagle's visit but testified he could not completely understand what was on the document handed him by Nagle. According to Onitsuka, he was concerned when he saw the number "7", and he and Nagle both agreed that this was a mistake. The number was then changed to "2", and both then initialed the number.[32] (U.4.) Onitsuka testified, however, that none of the children worked on either January 2 or January 7. (I:70-72.)

Socorro Rodriguez testified that the signatures on Union 4 were those of the children, that she was present when they signed the document, and that it had been brought to her by her boss, Akiko Onitsuka, on January 6 or 7, before the

[32]Around this same time frame Onitsuka asked Socorro Rodriguez whether the children had in fact worked on January 2. She replied they had not but that they had on January 3, infra. Onitsuka conducted an investigation and determined that Socorro and her husband Matias Rodriguez, Sr. had worked on January 3 but not January 2. (III:19-23.) (The children only worked on days the Rodriguezes worked, infra.) He did not turn this new information over to Nagle.

election. ". . . .1 asked her why she needed the boys' signature, and she said, 'Oh, that shows the pounds and things they had done so that I can write their checks'". (V:19.) Analysis and Conclusions of Law

Much of Nagle's testimony stands uncontradicted. At the pre-election conference a Company representative, in the presence of a second Company representative, acknowledged that four children had worked during the eligibility period. Later, that same representative during a phone conversation, with Onitsuka standing next to him, again confirmed that these children had worked during the eligibility period. Neither Company representative — Uchida or Highfill -- testified at the hearing herein. Thus, neither Uchida, Highfill (nor Onitsuka) has ever denied that these admissions were made. "An administrative board must accept as true the intended meaning of uncontradicted and unimpeaced evidence. . . .(W)hen a party testifies to favorable facts, and any contradictory evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it." Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 728. I credit Nagle, who testified in a credible and dignified manner with a good, solid recall of the facts, that these admissions were made.[33]

[33]On the other hand, serious questions arise regarding

Nagle also testified that the day after the pre-election conference he met with Onitsuka who handed him a handwritten note (U.4) with the names of four children on it and that Onitsuka told him that these were the four children who were eligible to vote, having worked during the eligibility period. Nagle then requested that Onitsuka initial the note, indicating agreement to these additions to the eligibility list. Onitsuka complied. Onitsuka's defense to these admissions appears to be that he doesn't know how the children's names got on the handwritten note and that he couldn't fully understand what was on the note anyway. I credit Nagle's testimony as to what occurred in his conversation with Onitsuka. In addition, the Company's position on the eligibility of these children did not change

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Onitsuka's testimony. If he in fact told Uchida that the children were not employees and should not be included on any eligibility list, why wouldn't Uchida have mentioned this at the time that the children's names actually were brought up by the Union representatives at the pre-election conference in their effort to have them included on the list? It was not as if Uchida did not object to the inclusion of the children – he did, but on the grounds that they were too young. Obviously, if he objected on this ground, the matter had to have been previously discussed with Onitsuka. Further, if there had really been any confusion about whether these children had worked during the eligibility period, why would Highfill have sat idly by while Uchida, who had helped prepare the list, agreed with the UFW representatives that the children had indeed worked during the eligibility period?

from the pre-election conference until the election, i.e., it was only at the election that the Company attorney informed the ALRB for the first time that it was contesting the eligibility of the children on the grounds they did not work during the eligibility period.

Certainly, these numerous admissions, made as they were close to the time of the actual events, should be given salient weight and particularly so when viewed next to the inconsistent and confusing testimony of Onitsuka.

2. The Children's Work

Matias and Socorro Rodriguez both work for Salinas Valley Nursery. They have three children, Matias, Jr., 13 years of age (at the time of the election), Ernesto Daniel, 11 years and 10 months (at the time of the election), and Pedro, 9 years old (at the time of the election) (V:8-10). In the past, these three children, and sometimes a friend of theirs, Ramon Solario[34], 11 or 12 years old, would all accompany the elder Rodriguezes to work and would play there together. Onitsuka testified that around Christmas, 1986, he came up with the idea of letting these children do some

[34] When Onitsuka received the ALRB eligibility list, he testified that he noticed Solario's name and then made an effort to find out who he was. Though he still claims to this day not to know Solario, he did testify that he was aware that a certain person played with the Rodriguez children and assumed that Solario was this person. (I: 78-79; II:77.) During the week following the filing of the Petition for Certification, Onitsuka testified he saw a young person with the Rodriguez children that he had seen on the property with them on an earlier occasion. (1:78-79, 88-84.) (It will

simple work like folding newspapers[35] as long as they were there and paying them for this work by the pound. This idea was accepted and thereafter, at different holidays, Onitsuka would offer newspaper work to these four children.[36]

Onitsuka also testified that no special arrangements were ever made for the children to work; when they showed up, they were put to work. They did not punch a time clock. They worked either inside the new or old packing shed. The boys only worked on days that Socorro Rodriguez and Matias Rodriguez, Sr. worked.[37] (Both Rodriguezes worked the same days and had the same days off.) (I:68-69; II:68; III:20-23; V:10-12, 27-29.)

Onitsuka testified that during 1987 the children worked during the summer and two or three times around

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(footnote 34 Continued)

be recalled, supra, that, in fact, on January 8 Onitsuka had presented Solario's name to Nagle as one of the four boys that was employed by him during the eligibility period.) (IV:84-86.) (U.4.)

[35]When flowers are shipped, it is necessary to have newspapers lining the bottom of the flower box. The children's job was to open the boxes and spread the sheets of newspaper out to a certain height. (1:65-67.)

[36]There is no longer a claim that the newspaper work is not to be considered agricultural. (See Post-Hearing Brief of Employer.) In fact, according to Onitsuka, part-time worker Aldo Saldana, infra, performed this work on January 3 and was paid his regular salary as no distinction was made between newspaper work and work at the greenhouse.

[37]0nitsuka also testified that the father, Matias, Sr., would help the children finish up the newspaper work during the lunch periods, break time, after work, or on his days off by rolling the newspapers up and putting them in

Thanksgiving time[38] but not after Christmas of 1987[39] (II:76, 69-70; V:117).

Onitsuka also denied that the children worked on his property during the week preceding the filing of the Petition for Certification, specifically including January 3[40] but testified that he personally saw them doing newspaper work on January 4 (the day after the last day of the

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their proper place. (I:65-67; V.-115-117, 124-125.) However, he also testified that he had never himself witnessed Rodriguez spreading any newspapers. (V:126.) (Then he asked that that statement be retracted (V:127).) Matias, Sr. denied that he ever did any of the newspaper work. (V:97.)

[38]In his declaration, Onitsuka had declared that: "1 do not believe the children worked since the summer of 1987 until December. (U.I, p. 2 of Declaration of George Onitsuka.)

[39]In his declaration, Onitsuka declared that the children had worked on his premises during December. (U.I, p. 1, Declaration of George Onitsuka). On cross-examination Onitsuka stated that "....this sentence is in error as a result of my conferring with my lawyer." Onitsuka now denies that any of the children worked at any time during the month of December, 1987. (II:80.) Originally, Onitsuka testified that between Thanksgiving and the election the children didn't come to work because it was too cold. (V:118.) Then he testified that it was because he didn't call them back owing to the fact that his newspaper stock was already full

[40]onitsuka testified that on an average working day he would pass 10 feet in front of the old packing shed frequently as he would be going from the trailer (50 feet away from the old packing shed) to the new packing shed because the greenhouses were right there. Onitsuka further testified that the folding of the newspapers took place 20 feet from the entrance to the old packing shed. (I:74-75.) At no time did he see the children. He also testified that had they been working he would have known it but that he might not know specifically if they were playing because the work place and where they played were in completely separate areas. (I:75-76; 11:78.) Shortly after this testimony, however,

eligibility period) and 5 at the old packing shed.[41]

Onitsuka was not sure if the children worked after the election, testifying at first that they did, then that they did not. In any event, at some point he told the Rodriguez parents not to bring the children to work anymore because his lawyer had advised against it as the children had neither social security numbers nor work permits. (I:77; II:68-71.)

Akiko Onitsuka testified that after the summer of 1987 she did not see the Rodriguez children again until January 4, 1988 in the afternoon. A fourth child was with them. (III:65.) However, in a sworn statement (U.1) Onitsuka had previously stated that the children had worked in December. Onitsuka explained that this was an incorrect statement and that her declaration was wrong. (III: 66.)

Socorro Rodriguez testified that she and her husband would sometimes bring the children with them when they went to work and that the children would work for 3-4 hours. At times the children would go with them in the morning and then

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(Footnote 40 Continued)

Onitsuka changed his mind and testified that he would have noticed the children playing (11:79).

[41]Just prior to this testimony, Onitsuka had testified that the children did not work after Christmas and did come to the nursery until around January 15. (I:70.) No mention was made of January 4 or 5.

they would take them home at noon; at other times they would pick the children up at noon, bring them to work, and take them home after work in the evening. Onitsuka would not require any number of hours or days to be worked — just that the job be finished. (V:ll, 22-23, 58-60.)

According to Rodriguez, Onitsuka, aware that school vacations were coming up, would tell her to bring the children over to do the newspaper work, if there were such work available. Specifically as to 1987, Rodriguez testified that Onitsuka told her that there was work for the children just before they got out for their Christmas vacation on December 19. (V:58-60.)

Rodriguez further testified that initially for two days in December of 1987 the children worked close to where she worked in the new packing shed but that later on they were moved to the old shed closer to the trailer where she could no longer see them. They worked in the old packing shed in the same spot - over on the south side on the left in the corner - the last days of December and on January 3.[42] They also took their lunches or snacks there. No one else would have been in that shed working with them. (V:23-24, 31, 43-48.) (See also, III:50-51.)

[42]Company records indicate that both Socorro Rodriguez and Matias Rodriguez, Sr. worked on January 3 (but not on January 2). (III:22-23.)

Rodriguez testified that she definitely remembered the children working during the last days of December 1987[43] and from 7:00 a.m. - noon on January 3/ 1988.[44] At that point they had finished the newspaper job; after that, they rested and went back to school. They did not work at the nursery after January 3, 1988.[45] (V:10-12, 25-29, 32, 35-36.) (See also V:94.)

Matias Rodriguez, Sr. testified that the children worked many days during the 1987 Christmas school vacation and that January 3 was their last day. (V:94-95.) One of the children, Daniel Rodriguez, testified that he and the other three worked several days during the 1987 Christmas vacation. (V:83.)

Analysis and Conclusions of Law

Apart from Union Exhibit 4, there are no actual Company records in this case that can determine finally

[43]Company foreman Guevara testified he remembered seeing the children on the premises about two weeks before the election. (IV:54.) The election was held on January 11, 1988. (U.6.)

[44]Initially, Onitsuka acknowledged that Socorro Rodriguez had told him that the children had worked on January 3. (1:72.) Then he testified he didn't hear from her at all on this question (1:76-77). Later, he testified that Rodriguez had not mentioned anything about January 3. (III:20.)

[45]onitsuka testified that none of the children worked on the newspapers on January 3 (1:72-73) but that one of the part-timers, Aldo Saldana did. (V:121-123.) Saldana was not called to testify. His declaration does not indicate he worked on the newspapers on January 3 (U.1).

whether, in fact, these boys worked during the relevant time period.[46] They punched no time clocks; they had no time-cards; they were unsupervised. However, there are the admissions, and there is testimonial evidence. As regards the latter, I credit the testimony of the Rodriguezes that these children worked for the Employer during the last days of December, 1987 and certainly on January 3, 1988 -- dates within the eligibility period. Socorro Rodriguez was an excellent witness, direct and responsive, especially on questions relating to the crucial line of inquiry regarding when the children worked. I was impressed with the manner in which she detailed how it was that she could recollect specifically the fact that the children worked on January 3. She had good recall. Matias[1] recollection was not as good, but he was certain that the children worked on January 3, and I credit him. Daniel Matias, 12 years old, testified credibly about his work at the nursery over the Christmas holidays.

This testimony is to be contrasted with that of Onitsuka who was often vague, contradictory, and confusing. Onitsuka testified the children worked around Thanksgiving, 1987. His declaration had denied it. He testified the children did not work after Christmas, 1987 and then

[46]The Employer argues that a check made out to Matias Rodriguez in the amount of $108.69 for "newspaperwork-second week" is some kind of proof that the boys worked on January 4 and 5 and not January 3. (Post-Hearing Brief of Employer, p. 19.)

testified that, in fact, they did not work at any time during December. When shown his declaration which had declared that they had worked during December, he testified that after conferring with his lawyer, he had determined that the declaration was in error. He testified that the children were not at the nursery until around January 15, then testified they were there on January 4 and 5. He testified that Socorro Rodriguez had told him the children had worked on January 3, then testified she did not. He testified that the children worked after the election, then testified they did not. He testified he would not have seen the children on his premises playing, then testified he would have.

Onitsuka also gave different reasons for why he did not need the children to roll newspapers over the Christmas holidays (first too cold, then plenty of stock already rolled up), then testified that his son and part-timer Saldana were hired during this time to do the very same work. He never explained this inconsistency.

Onitsuka made a big deal over the fact that when he met with Nagle personally, he wanted to make sure that the

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(Footnote 46 Continued)

But such a notation on a check dated January 16, a time when the issue of eligibility was very much being debated, is so self-serving that I cannot give it any weight. I also note that none of the checks in evidence (Empl's 15-25) contain similar notations regarding the week in which work was supposedly performed.

number "7" on Union Exhibit 4 was changed to the number "2" because the "7" was a mistake. He then initialled the document. Why? Clearly, Onitsuka thought that the four boys indeed did work on January 2, else why would he have placed his initials on the paper right beside the date. As it turned out, he was wrong; they did not work on January 2 but did on January 3. He found out he had been wrong when he had a conversation with Socorro Rodriguez which was apparently held right after his conversation with Nagle. Onitsuka asked her pointedly if the children had worked on the 2nd, and she replied they had not but that they had worked on the 3rd. He tried to confirm this so he ran an investigation and found that indeed, the Rodriguezes had not worked on the 2nd but that they had on the 3rd. Yet, he chose not to turn this new information over to Nagle. Why? Presumably, he must have concluded that it would not have made any difference since both dates were within the eligibility period.

Besides Onitsuka, other witnesses testified that they did not see the four boys on certain dates in late December, 1987/early January, 1988, e.g., Akiko Onitsuka (III:61), Jim Uyeda (III:93, 109-110), Mike Mota (December 31) (IV:16-18, 20-25, 31), and Masahiro Yoneda

(December 31) (IV:2-5, 7-11).[47] But this evidence is unpersuasive especially where the power to observe was obstructed or otherwise limited. None of these witnesses worked in the same location as the children nor was there any particular reason they would have been specifically looking for them. And there was never any supervision over the children's work. (The same could be said about the part-timers who removed the cement blocks.) Besides the specific dates mentioned in the testimony about December 31, January 2 and 3, there were still an additional four days in the eligibility period when these children may have worked including New Years day, a work day for the Rodriguezes.

The Employer argues that UFW organizer Ifrael Edeza testified that he observed the children on the property on January 4 when he took access. (Post-Hearing Brief of Employer, p. 18.) Actually, it was never clear when Edeza took access, and his recollection of dates was not very good. (V:70-71.) For example, he could not recall when the January 4 Petition for Certification was filed. (V:74.) In any event, Edeza's observation of the children at the nursery

[47]Steve Pacheco testified he did not see the children when he worked on December 26 and January 2. December 26 is outside the eligibility period; and no claim is made by the UFW that the children worked on January 2. (IV:13-14.)

could have occurred prior to January 4 as he testified that he saw the boys working there when he was organizing and that this was during an access period which occurred before he had filed the Petition. (V:70, 72.)

The credited testimony of Socorro Rodriguez, Matias Rodriguez, Sr., and Daniel Rodriguez, taken in conjunction with the early admissions of Onitsuka and his representatives, convinces me that these four boys actually did work for the Employer during the relevant time period. I also note that the four children had worked over prior vacations since Christmas vacation, 1986, including the 1987 summer and Thanksgiving vacations.

The Employer also argues (Post-Hearing Brief of Employer pp. 22-23) that certain elements of employee status are missing from the children. It argues that there were no timecards or checks made out as compensation for any work performed. Of course, for considerable periods of time there were no timecards or checks either for the part-timers, Holbrook and those who were friends of Yuji's, e.g., Moto, Yoneda, Saldana, and the Pacheco brothers. (Curiously, this condition lasted until it was changed just around the time of the eligibility week.)

The Employer argues that the children were not supervised or controlled by the Employer, but neither were the part-timers, particularly when they were engaged in the

removal of the concrete slabs, a major part of their employment during the eligibility week. I do not regard the owner's son, Yuji, as a statutory supervisor, and there was no evidence to that effect presented during the hearing.

The Employer argues that the four boys did not receive any of the incidents of employment such as social security, unemployment or disability coverage. Neither did the part-timers who most of the time exchanged their labor for pizza or flowers.

The Employer argues that the children did not meet the section 1157 requirement of being "on the payroll" during the eligibility period. But the Employer construes the statute much too narrowly. It has been Board policy for some time to broadly interpret the meaning of the word "payroll" or "payroll period immediately preceding the filing of the petition." Where names of workers were not on the payroll list because they were being paid on a family unit basis, the Board noted that those names did not appear ". . .for the purpose of mutual convenience. . ." and should have been included on the eligibility list. M.V. Pista & Co. (1976) 2 ALRB No. 8, p. 2, fn. 1. See also Valdora Produce Co. (1977) 3 ALRB no. 8 where the Board recognized that it was a common practice in agriculture for one family member to receive in his or her name the paycheck representing the cummulative efforts of two or more family members and that as a result,

some of the family members' names would not always appear on the eligibility list. The Board held that those employees, so long as they were paid during the applicable payroll period, were eligible to vote. Valdora also held that employees were to be considered eligible to cast ballots if it appeared that they would have performed work for the employer but for their absences due to illness or vacation. In Rod McLellan Co. (1977) 3 ALRB No. 6 the Board held that employees on paid vacation or paid sick leave during the applicable payroll period were eligible to vote. The Board found that "the term 'payroll[1] did not describe a particular piece of paper." 3 ALRB No. 6 at pp. 3-4. See also Comite 8, Sindicato de Trabajadores Campesinos Libres (Hiji Bros.) (1987) 13 ALRB No. 16. And in Wine World, Inc. (1979) 5 ALRB No. 41 four employees were challenged during the voting on the grounds that their names did not appear on the list of employees who worked during the relevant payroll period. Company records indicated that three of the four employees had been injured in work-related accidents prior to the election and that their injuries prevented them from returning to normal work until after the week used to determine voter eligibility (IHED, pp. 5-6). The Board, found these employees eligible to vote despite the fact that their names did not appear on the eligibility list.

The Employer argues that the boys were ineligible to vote because there was no agreement either expressed or

implied between them and the Employer to work during the eligibility week. But it is obvious from reviewing the work histories of all the part timers that Onitsuka ran a very loose, informal operation when it came to arranging for workers. Often it was just a matter of showing up. Onitsuka testified that rarely were special arrangements made for the part-timers to work; when they arrived at the premises, they were given employment. In the case of the children, Onitsuka would simply tell Socorro Rodriguez work was available, and they would then accompany her and her husband to the work site. Specifically, Onitsuka told her just before the 1987 Christmas vacation that there was work for the children and pursuant to that information, they showed up at the nursery and were given jobs. Some of this work was performed during the eligibility period.

The fact is that Onitsuka did not require and had never required that the children or their parents on their behalf check in with him upon arrival at or departure from work or that they punch a time clock or that they work a certain number of hours. As a matter of fact, it really didn't matter to him how many children worked since he was paying by the pound and not by the hour. Whatever the pounds added up to, he would just write a check to Matias, Sr. (sometimes to Matias, Jr.), and so far as he was concerned, they could just divide up the earnings anyway they wanted and

among as many persons as they wanted. Of course, Onitsuka would know that the work had been performed because at some point he would weigh the newspapers in order to determine how much to pay for the work that was done. Thus, assuming arguendo that Onitsuka lacked knowledge as to which children worked when,[48] he cannot be heard to complain as it was his decision not to keep tabs on them.

Though Onitsuka may have, on the advice of counsel and for whatever reason, decided to no longer hire minors at his place of business, as of mid-January, 1988, the fact is that he did employ them as workers at the time of the eligibility period for the election. As Onitsuka benefited from their labor, so too must he suffer the consequences of his acts, i.e., as employees who worked during the eligibility period, the four boys are entitled to vote in any ALRB conducted election.

Finally, the Employer argues that the children were prohibited by state law from working without a labor permit and none was furnished to it. On this basis, the Employer argues that "[t]he ALRA should be interpreted as to exclude minors without school permits from the definition of the word

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[48]Again, one must not lose sight of the fact that Onitsuka admitted to Board agent Nagle that he was aware that four minor children, including Ramon Solario, worked for him during the eligibility period.

'employee[1]; or, in the alternative, assuming they are 'employees', the right to vote should be denied on public policy grounds of conflict with the policy of the school laws...." (Post-Hearing Brief *of* Employer, p. 25.)

It would be more appropriate for the Employer to address its public policy arguments to the State Legislature and not to the ALRB. All that is required under the Agricultural Labor Relations Act for a person to vote in a Board conducted election is that the individual be an agricultural employee whose employment occurred during the eligibility period.[49] Had the Legislature intended to limit a farmworker's eligibility to vote to a certain age, it would have, presumably, said so. Instead, it chose not to differentiate voters in union elections on the basis of age.[50] That being the case, I do not see how I have the authority to do so in this case.

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[49]Labor Code section 1157 states, in relevant part:

> "All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote."

[50]It has been held, for example, that by extending ALRA rights to all agricultural employees, the Legislature clearly intended to include undocumented workers since it was aware of agriculture's historical reliance on them. Rigi Agricultural Services, Inc. (1985) 11 ALRB No. 27, rev.den. by First Appellate District, November 27, 1985.

The Agricultural Labor Relations Board, in recognition of the legislative mandate that all agricultural employees be allowed to vote if they worked in the period immediately preceding the filing of the petition, placed no age limitations on employee voting when it formulated its Regulation relevant to this subject matter.[51] In point of fact, the only Regulation that could be said to pertain to minors is section 20352(b)(5) which disqualifies only the Employer's children from voting. This was not because of any concern about the actual age of those children but because children of the employer should not have to choose between their parents and a labor organization. To do so might jeopardize the concept of a free election. But there is absolutely no restriction placed on the eligibility to vote of bargaining unit employees, and no provision exists in the Board's Regulations to challenge a prospective voter on such basis. See ALRB Regulation 20355.

In fact, though the issue has not been dealt with directly, minors have either been allowed to vote in ALRB conducted elections (so long as they worked during the eligibility period), e.g., Visalia Citrus Packers (1984) 10 ALRB No. 44, pp. 3-5, or there has been a strong suggestion that they are entitled to vote (if otherwise eligible) under

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[51]The Regulation reads as follows:

(a) Those persons eligible to vote shall include:

such circumstances, e.g., Coachella Imperial Distlrbutors (1979) 5 ALRB No. 73, p. 7; Coachella Imperial Distributors (1979) 5 ALRB No. 18, pp. 4-5.

(Footnote 51 Continued)

(1) Those agricultural employees of the employer who were employed at any time during the employer's last payroll period which ended prior to the filing of the petition, except that if the employer's payroll as determined above is for fewer than five working days, eligible employees shall be all those employees who were employed at any time during the five working days immediately prior to the filing of the petition.

(2) Employees who are absent from work during the applicable payroll period but who are receiving pay for that period from the employer, as in the case of employees on paid sick leave or paid vacation;

(3) Employees who would have been on the payroll during the applicable payroll period but for the employer's unfair labor practices; and

(4) Eligible economic strikers,

(b) The following are ineligible to vote:

(1) Supervisors as defined in Labor Code section 1140. 4 (j);

(2) Guards employed to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises;

(3) Managerial employees;

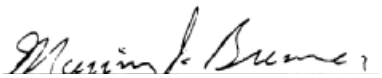
(4) Confidential employees; and

(5) The parent, child, or spouse of the employer or of a substantial stockholder in a closely held corporation which is the employer."

Ultimately, I cannot take the Employer's protestations against child labor very seriously since it was the Employer who hired the minors in the first place, did not ask that they have permits, gave them employee status, profited from their labor, and who now asks that they be disqualified from voting.

I recommend that the Employer's challenges to the eligibility of Matias Rodriguez, Jr., E. Daniel Rodriguez, Pedro Rodriguez, and Ramon Solario be overruled.

DATED: September 23, 1988



MARVIN J. BRENNER
Investigative Hearing Examiner